85-1567

No.

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

NANCY J. VARRASO
SPECIALIST FIVE, U.S. ARMY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

VAUGHAN E. TAYLOR
Civilian Defense Counsel
Taylor and Kripner
Attorneys at Military Law
824 Gum Branch Road, Suite G
Jacksonville, NC 28540

JAMES S. MARTINSON
Civilian Defense Counsel
Taylor and Kripner

QUESTIONS PRESENTED

1. Whether an individual's right to counsel attaches in the military when the attorney-client relationship is formed thus requiring notice to counsel by investigators who know of the relationship prior to questioning an accused?

2. Whether petitioner's confession, made while she was deprived of sleep, rendered under the pressure of constant interrogation by a team of interrogators for seven or eight hours, and induced by implied promises that a confession to a lesser sentence, in light of her mental and physical exhaustion was involuntary.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	ii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statutory Provisions Involved	2
Other Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Question 1	5
Question 2	9
Conclusion	10
Appendix A	13
Appendix B	25

TABLE OF AUTHORITIES

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25 (1972)	8
Bram v. *United States*, 168 U.S. 532 (1897)	9
Brewer v. *Williams*, 430 U.S. 387 (1977)	10
Carnley v. *Cochran*, 396 U.S. 506 (1962)	8
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	9
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	8
Massiah v. *United States*, 377 U.S. 201 (1964)	9
Miranda v. *Arizona*, 384 U.S. 436 (1966)	9
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)	9, 10
United States v. *Annis*, 5 M.J. 351 (C.M.A. 1978)	6
United States v. *Littlejohn*, 7 M.J. 200 (C.M.A. 1979)	9
United States v. *Lowry*, 2 M.J. 55 (C.M.A. 1976)	6
United States v. *McDonald*, 9 M.J. 81 (C.M.A. 1980)	6, 7

Cases – Continued: Page

United States v. *McOmber*, 1 M.J. 380 (C.M.A. 1976) 5, 6, 7, 8, 9
United States v. *Sutherland*, 16 M.J. 338 (C.M.A. 1983) 6, 7
United States v. *Turner*, 5 M.J. 148 (C.M.A. 1978) 8, 9
United States v. *Varraso*, 15 M.J. 793 (A.C.M.R. 1983) 6

Constitution and Statutes:

U.S. Const. amend. V 10
U.S. Const. amend. VI 7, 8
Uniform Code of Military Justice, 10 U.S.C. § 822 2
Uniform Code of Military Justice, 10 U.S.C. § 827 ..... 6, 7, 8
Uniform Code of Military Justice, 10 U.S.C. § 831 6, 7
Uniform Code of Military Justice, 10 U.S.C. § 860 3
Uniform Code of Military Justice, 10 U.S.C. § 866 3
Uniform Code of Military Justice, 10 U.S.C. § 867 3
Uniform Code of Military Justice, 10 U.S.C. § 918 2
Uniform Code of Military Justice, 28 U.S.C. § 1259(3) 1

Other Authorities:

Military Rule of Evidence 305(e) 2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

NANCY J. VARRASO
SPECIALIST FIVE, U.S. ARMY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Specialist Five Nancy J. Varraso, U.S. Army, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the United States Army Court of Military Review (App. A) is reported at 15 M.J. 793 (A.C.M.R. 1983). The opinion of the United States Court of Military Appeals (App. B) is reported at 21 M.J. 129 (C.M.A. 1985).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on December 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself."
>
> Amendment VI: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

STATUTORY PROVISIONS INVOLVED

Article 27(a)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 827, provides:

> "(a)(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial."

OTHER PROVISIONS INVOLVED

Military Rule of Evidence 305(e), 1984, provides:

> "(e) Notice to Counsel. When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed."

STATEMENT OF THE CASE

Pursuant to his authority under the Uniform Code Of Military Justice,[1] the Commander, United States Army Transportation Center and Fort Eustis, Fort Eustis, Virginia, convened a general court-martial to hear the case against the petitioner. Contrary to her plea, petitioner was convicted by general court-martial composed of officer members of unpremeditated murder in violation of Article 118 of the Uniform Code of Military Justice.[2] The court-martial members sentenced her to confinement at hard labor

---

[1] Article 22, UCMJ, 10 U.S.C. § 822

[2] 10 U.S.C. § 918

for eight years, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade (E-1), and a dishonorable discharge from the United States Army. The Commander, United States Army Transportation Center and Fort Eustis, Fort Eustis, Virginia approved the findings and sentence as adjudged by the court-martial pursuant to Article 66, Uniform Code of Military Justice.[3] The United States Army Court of Military Review approved the findings and sentence pursuant to Article 66, Uniform Code of Military Justice.[4] Petitioner sought further appellate review of this case under Article 67(b)(3) of the Uniform Code of Military Justice[5] to the United States Court of Military Appeals. However, the Court did not grant review on Question 1 or 2 and ultimately approved the findings and sentence below (App. A).

When Private Tammy Meza-Luna failed to report to morning formation on 29 September 1980, her husband, Specialist Five Manuel Meza-Luna, began to search for her. After asking several of his wife's friends as to her whereabouts, Specialist Five Meza-Luna searched a wooded area outside her barracks (R. 657). He ultimately found his wife's body suspended by a rope which was tied to a tree. A noose encircled her neck, her feet were touching the ground and her hands were tied behind her back (R. 658-9; P.E. 21).

That same morning, petitioner arose between 0400 and 0430 hours in order to report to Fort Eustis, Virginia, where she performed manual labor the entire day (R. 280-1). She did not return to Fort Story until approximately 1700 hours on the evening of 29 September 1980 (R. 282). This followed what could have been classified as a hectic weekend during which the personnel of the post had been placed in restriction status. Everyone was subjected to numerous calls to formation and patrols. Immediately upon her arrival petitioner was ordered to remain in the unit orderly room (R. 63). Approxi-

---

[3] 10 U.S.C. § 860

[4] 10 U.S.C. § 866

[5] 10 U.S.C. § 867(b)(3)

mately an hour later she was transported to the Military Police Station by a uniformed warrant officer. She remained uninformed and essentially incommunicado of the circumstances surrounding her apprehension until 2325 hours when she was escorted to the Military Police Investigations Office at Fort Story, Virginia (R. 108-16, 157, 163). She signed a waiver of her Article 31, Uniform Code of Military Justice[6], rights after being informed that she was suspected, not accused, of murder (R. 196, 286).

Prior to her transfer from the Military Police Station, Special Agent Flahive, Criminal Investigation Division (CID), Fort Eustis, Virginia, was conducting an investigation into the death of Private Tammy Meza-Luna. His probable cause for apprehending the petitioner was based on information given him by the deceased's husband; Cpt. Wicinski, petitioner's Company Commander; Special Agent Hatcher, CID, Fort Eustis, Virginia; and Private Kimberly Cavanaugh. All communications made to SA Flahive concerned the admitted homosexual preferences and activities of the deceased, the petitioner, and a third party, Private Rebecca Smith. Special Agent Hatcher advised SA Flahive of the investigation he personally conducted involving the self-admitted homosexuality of petitioner and Private Smith (R. 157-8). Special Agent Hatcher's investigation resulted in the initiation of administrative elimination proceedings for petitioner which were ongoing at the time SA Flahive was conducting his probe into the death of Private Meza-Luna. A defense counsel, Captain McCormack, was appointed to represent petitioner in the Hatcher investigation and proceedings; however, none of the agents attempted to notify him prior to interrogating petitioner concerning Private Meza-Luna's death.

Petitioner was interrogated for approximately seven to eight hours by several Criminal Investigation Division agents (R. 168, 199, 227, 260). During the interrogation, petitioner was told by at least two of the agents that if she admitted to

---

[6] 10 U.S.C. § 831

having assisted the deceased in committing suicide, she would be guilty only of manslaughter; however, if she did not confess she would be found guilty of murder and sentenced to lengthier confinement (Art. 32, p. 352-60; R. 251, 267-71, 290-1). It was only after this conversation that she confessed, signing a confession at 0835 hours, 30 September 1980, some thirteen and a half hours subsequent to being taken into custody (P.E. 3).

At trial petitioner moved to suppress her statement and any evidence derived therefrom (A.E. XVII). The bases for her motion were: (1) the statement was not voluntarily given (A.E. XVIII); and (2) petitioner's counsel, with respect to a prior investigation, was not notified of the interrogation (A.E. XXIII). The military judge denied the motion (R. 360-363).

REASONS FOR GRANTING THE WRIT

By its refusal to grant review of Question 1, the United States Court of Military Appeals decided an important question of constitutional and military law which has not been, but should be, settled by this Court, namely, whether effective assistance of counsel is denied when retained counsel are not notified by investigators prior to questioning a suspect.

The military's notice to counsel requirement is grounded in the Court of Military Appeals decision in *United States* v. *McOmber*, 1 M.J. 380 (C.M.A. 1976). The Court stated the notice rule:

> If the right to counsel is to retain any vitality, the focus in testing for prejudice must be readjusted where an investigator questions an accused known to be represented by counsel. We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code.

Id. at 383.

The *McOmber* notice requirement was statutorily adopted in Rule 305(e) of the Military Rules of Evidence which became effective on 1 September 1980. It requires:

> Notice to Counsel. When a person subject to the Uniform Code of Military Justice who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

While the rule in *McOmber* was derived from Article 27 of the Uniform Code of Military Justice[8] and not the sixth amendment, a right to counsel based on the sixth amendment exists. *See United States* v. *Annis*, 5 M.J. 351 (C.M.A. 1978). *McOmber* and Rule 305(e) do not depend on a request by the accused for counsel, nor is it required that the accused inform his interrogators of the existence of an attorney-client relationship. Rather, the notice requirement is triggered when the interrogator knows or reasonably should know that counsel has been retained by the accused or suspect. In addition, Rule 305(e) clearly requires notice to counsel regardless of who initiates the interrogation and regardless of the previous advice given by the counsel to the accused.

The Army Court of Military Review rejected petitioner's argument that notice to counsel was required under Military Rule of Evidence 305(e) and *McOmber* stating that "the plain wording of MRE 305(e) exempted any requirement for notice to the appellant's appointed counsel as the offense for which she was interrogated was different and unrelated to any for which the counsel had been appointed." *United States* v. *Varraso*, 15 M.J. 793, 796 (A.C.M.R. 1983). The Court found that the two offenses were different and unrelated citing *United States* v. *Lowry*, 2 M.J. 55 (C.M.A. 1976) and *United States* v. *McDonald*, 9 M.J. 81 (C.M.A. 1980), cases dealing with notice to counsel and discussing the distinctions between offenses.

---

[8] 10 U.S.C. § 827

Lowry, decided eight months after *McOmber*, extended the notice requirement to situations involving offenses that are in any way related. The case involved interrogations dealing with the accused's possible role in the arson of several buildings. Although each interrogation dealt with different buildings, the Court was unwilling to make "subtle distinctions" that require the separation of offenses occurring within the same general area within a short period of time. 2 M.J. at 59.

The Army Court of Military Review, apparently relying on the peculiar facts of *McDonald*, reasoned that the facts in petitioner's case were similar and therefore the two offenses involved were different and unrelated. The issue discussed in *McDonald* was whether the accused who earlier had been apprehended and questioned by military authorities concerning sale of marijuana was entitled to have counsel notified by a civilian Secret Service agent who questioned the accused as part of a civilian investigation involving an altered United States Treasury check. The Court discussed the *McOmber* rule finding that Articles 27 and 31, Uniform Code of Military Justice[9] were inapplicable because the offenses were unrelated. 9 M.J. at 85.

It is clear that the two offenses discussed in *McDonald*, namely, sale of marijuana and altering a United States Treasury check, are not in any way related. A similar conclusion was reached by the Court of Military Appeal in *United States* v. *Sutherland*, 16 M.J. 338 (C.M.A. 1983). In that case, Sutherland, pending court-martial charges of possession of marijuana and lysergic acid diethylamide, was questioned by an investigator concerning charges of conspiracy to commit forgery, unauthorized absence, disrespect towards a superior petty officer, wrongful appropriation and receiving stolen property. The Court specifically found that the offenses were not closely related in some manner, and thus, the *McOmber-Lowry* rule was inapplicable.

The Army Court of Military Review erred by concluding that the offenses involved in the two investigations were separate and unrelated. However, it admitted that informa-

---

[9] 10 U.S.C. §§ 827, 831

tion contained in the earlier investigation provided probable cause to arrest petitioner by the investigators. The Court also concluded that the earlier investigation provided the existence of motive or the possibility thereof in the investigation. *Varraso,* 15 M.J. at 797. The record also reflects that the investigators knew that petitioner had been assigned a military lawyer to represent her in an administrative action related to her homosexual activities.

The Army Court of Military Review applying a very subjective standard in determining whether offenses are related ignores the more important guarantees implicit in Article 27, UCMJ, and the sixth amendment. The key interest should be in preserving an individual's right to counsel as expressed in *Lowry:* "[T]he basis of *McOmber* . . . was predicated on the conclusion that an accused could not receive the effective assistance of counsel if such counsel was not allowed to be present during the interrogation of his client." 2 M.J. at 59.

This Court has indicated on numerous occasions that the right to counsel is the most important of the criminal procedure guarantees of the Bill of Rights, because the advice of counsel is the best assurance that the defendant's other constitutional rights will be preserved. *See Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972). The Court of Military Appeals acknowledged this most important right in *United States* v. *Turner,* 5 M.J. 148 (C.M.A. 1978) where the Court discussed the admissibility of a confession as a sixth amendment right to counsel issue, ie., "was the denial to civilian counsel of the opportunity to converse with his client prior to the first interrogation a denial of Sixth Amendment rights, rendering the first confession inadmissible?" *Id.* at 149. The Court answered this question affirmatively. The Court equated a request by civilian counsel to talk to his client with a request for counsel by the accused himself. It is clear that a right to counsel does not depend upon the accused's request for such, *see, e.g., Carnley* v. *Cochran,* 396 U.S. 506 (1962), rather the Court concluded it was the existence of the attorney-client relationship which triggers the denial of the sixth amendment right to counsel when either asserted by the accused or his counsel in the

former's behalf. Of particular importance is the fact that *Turner* marks the attachment of the right to counsel even before adversarial proceedings have been brought.

The Court of Military Review ignores *Turner* and such cases as, *United States* v. *Littlejohn*, 7 M.J. 200 (C.M.A. 1979) which indicates *McOmber* is not concerned with probable representation but rather with "an existing attorney-client relationship." 7 M.J. at 203.

Petitioner submits that *Turner* mandates that once the attorney-client relationship has been created, a right to counsel attaches. Once the right attaches, it is immaterial whether the request for counsel originates because of a request by the accused pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or through the application of the *McOmber* rule. Regardless, there is a fair risk, notwithstanding her personal waiver, that petitioner was deprived of effective assistance of counsel. *See Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Massiah* v. *United States*, 377 U.S. 201 (1964). The absence of counsel therefore, negates the knowing and voluntary nature of petitioner's statement.

QUESTION 2

It is a settled principle of law that even if a suspect has been adequately advised of his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), a confession will nonetheless be inadmissible if it was not voluntarily given. *See, e.g., Schneckloth* v. *Bustamonte*, 314 U.S. 218 (1973). Additionally, it has long been held that a confession may not stand where the defendant has been given either expressed or implied assurance that a confession will result in a lesser sentence. *Bram* v. *United States*, 168 U.S. 532 (1897). This Court stated:

> But a confession, in order to be admissible, must be free and voluntary: this is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . A confession can never be received in evidence where the prisoner has been influ-

> enced by any *threat or promise*; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any *degree of influence* has been exerted.

168 U.S. at 542-43, (emphasis added).

While this Court has adopted a voluntariness test to determine whether a statement is voluntarily given, involving an independent review of the "totality of the circumstances," *Schneckloth* v. *Bustamonte*, 412 U.S. at 226, threats, promises and inducements must be closely scrutinized.

Petitioner submits that applying the "totality of the circumstances" test to her case, this Court will conclude that her statement was not voluntary. The combined effects of the deprivation or lack of sleep, the continued isolation during the interrogation, the nearly thirteen hours she was held by the authorities for questioning, the implied promises that a confession to having assisted the suicide would result in a significantly shorter sentence, and conversely, the implied threat that failure to confess would result in lengthly confinement, and finally, petitioner's mental and physical exhaustion resulted in petitioner's statement being involuntarily given. Such an action combined with the other factors justifies a finding of the intentional use of coercion by the government, *c.f. Brewer* v. *Williams*, 430 U.S. 387 (1977) (interrogator's intentional use of coercive circumstances forbidden), and a denial of petitioner's fifth amendment rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VAUGHAN E. TAYLOR
Civilian Defense Counsel
Taylor and Kripner
Attorneys at Military Law
824 Gum Branch Road, Suite G
Jacksonville, NC 28540

JAMES S. MARTINSON
Civilian Defense Counsel
Taylor and Kripner

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 46,216
CM 441203

UNITED STATES, APPELLEE,

v.

NANCY J. VARRASO, SPECIALIST FIVE
U.S. ARMY, APPELLANT.

For Appellant: *Martin S. Cosgrosve,* Esquire (argued); *Colonel William G Eckhardt, Captain Thomas J. Feeney, Captain Bernard P. Ingold* (on brief); *Colonel R. Rex Brookshire II, Major Patrick F. Crow, Captain John D. Martin.*

For Appellee: *Captain Richard G. Mann, Jr.* (argued); *Colonel James Kucera, Lieutenant Colonel John T. Edwards, Captain Thomas E. Booth* (on brief); *Lieutenant Colonel Adrian J. Gravell* and *Captain Gary L. Hoffman.*

Opinion of the Court

EVERETT, Chief Judge:

A general court-martial with officer members tried appellant on the charge that, "with premeditation," she had "murder[ed] Private First Class Tammy MezaLuna . . . by tying her hands behind her back with a belt, placing a rope around her neck and hanging her," in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918. Varraso pleaded not guilty; but, except for the words "with premeditation," she was found guilty as charged. Her sentence was a dishonorable discharge, confinement at hard labor for 8 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved this outcome; and the Court of Military Review affirmed.

15 M.J. 793 (1983).

In petitioning this Court for review appellant assigned seven issues, but review was granted only to consider:

> WHETHER THE MILITARY JUDGE ERRED BY NOT INSTRUCTING THE COURT ON INTERVENING CAUSE EVEN THOUGH SUCH DEFENSE HAD BEEN RAISED, AND THE INSTRUCTION WAS REQUESTED BY THE TRIAL DEFENSE COUNSEL.

I

A

At about 2:00 a.m. on September 29, 1980, Specialist Five Manuel Meza-Luna found his wife, Private First Class Tammy Meza-Luna, hanging from a rope which went over a tree branch and was tied to the base of another tree.[1] Her body was leaning forward at an angle; and her knees were bent so that her height was reduced from an erect position by about two inches. He untied the rope from the base of the tree, loosened the noose around her neck, and noticed that her hands had been tied behind her back with a military belt.

Subsequent medical examination of Tammy's body indicated that she had died between 8:00 and 10:00 p.m. on September 28, 1980, as a result of asphyxia from hanging. Dr. Faruk Presswalla, Deputy Chief Medical Examiner, observed marks around her neck which indicated that the noose had not been tightened. In his opinion, Tammy could have died "from asphyxiation by hanging even though her feet" were "touching the ground"; and he concluded that the asphyxiation was caused by suspension hanging and not by manual or ligature strangulation. He found no wrist chafing or other marks which would have indicated that a struggle had occurred when Tammy's wrists were tied with a regulation Army belt.

At trial, the following facts leading to Tammy's death were revealed. Prior to Tammy's death, appellant had maintained a lesbian relationship with Specialist Four Rebecca Smith.

---

[1] Various photographs which were admitted in evidence depict the scene, the deceased, and the rope.

However, on the evening of Saturday, September 27, Becky told her roommate "that she didn't want to be a homosexual" and "that she was being physically" and sexually abused by appellant. Tammy Meza-Luna also heard Becky's complaints and offered to help Becky get away from appellant. Later that same evening, Tammy entered into a homosexual relationship with Becky; and, because this came to his attention, the detachment commander directed Becky to stay in different quarters.

On the afternoon of Sunday, September 28, when appellant and Tammy visisted Tammy's husband, Manuel Meza-Luna, he and Tammy got into a fight, which appellant helped stop. Then Tammy found a knife and threatened to kill her husband and herself. Later, she again took the knife and threatened to cut her throat; but Manuel took the knife from her "without a struggle." Before leaving with appellant, Tammy told her husband that she would be dead the "next time . . . [he] saw her." However, he did not believe her because of her previous ineffectual attempts at suicide.

At about 3:00 p.m. appellant and Tammy went to the quarters where Becky Smith was staying. There a disturbance resulted; the two visitors were pushed outside, and military police brought them back to their own barracks. When she arrived there, appellant was "very upset about something" and "was arguing and fussing." The detachment commander "restricted [appellant] to the company area"; and soon thereafter she telephoned the company's orderly room and "said that they was going to kill themselves."

Thereupon, the charge of quarters, Private First Class Charles L. Huff, started over towards the female barracks; and enroute he "ran into Specialist Knight," who "said he had seen the girls going toward the woods with a rope." Huff "went out toward the woods" to search for them and saw "them up on this tree" with a rope approximately ¾ of an inch in diameter. After this interruption, appellant and Tammy returned to their barracks. Huff was on duty through the night, but he heard no "cries for help or" other "unusual noise[s]."

Although appellant did not take the stand at her trial, her version of the events was presented by a statement she made to an investigator on September 30.[2] According to this document, Varraso agreed with Tammy "to commit suicide"; and they went into the woods behind their barracks with a rope. Because of an interruption, they went back into the barracks, where they attempted unsuccessfully to commit suicide by drinking a mixture of Drano and water. Appellant went to sleep but was awakened by Tammy, who requested help in hanging herself. By this time Varraso had undergone "a change in heart about committing suicide." However, she went out with Tammy and "put the loop around her" neck with "about 3 inches of slack between the rope and her neck." Then, after saying "I still don't believe you are going to do" it and after kissing Tammy on the forehead, appellant "returned to . . . [her] room in the barracks and went to sleep." Subsequently, she learned Tammy was dead.

B

Prior to findings, the military judge discussed his proposed instructions with counsel. In the judge's view, lesser-included offenses of unpremeditated murder, voluntary manslaughter, and negligent homicide had been raised by the evidence; but assault had not been. Furthermore, all of the offenses had these "three common elements": (1) the victim was dead; (2) her death resulted from appellant's acts or omissions; and (3) the killing was unlawful.

Defense counsel requested the following instruction on intervening cause:

> If there was an intervening cause between acts or omissions of the accused and the death of the deceased, the accused cannot be held responsible for the deceased's death. Such an intervening cause is defined as an independent cause which intervenes between the original wrongful act or omission and the injury which turns aside the natural sequence of events, and produces

---

[2] *See* Appendix (consisting of pros. ex. 2 and 3) to this opinion.

> a result which would not otherwise have followed from the act or omission and which could not have been reasonably anticipated. In determining what could have been reasonably anticipated you are instructed to consider what a reasonable person would anticipate under the circumstances known to him at the time of the alleged act or omission.

In discussing this requested instruction with the judge, individual defense counsel explained:

> I would like an instruction on intervening cause to the extent that if the court would find or the jury would find that the deceased was in an area in a position from which she could extricate herself or could rescue herself and then intentionally went forward, slumped forward and killed herself, then that would be a separate intervening cause.
>
> * * * * * *
>
> You have a person who has a suicidal mind and it has no relationship.

The military judge responded that, even if the deceased "had a suicidal mind," any acts on her part which led to her death were foreseeable. Therefore, he denied the requested instruction.[3]

After counsel argued on findings, the judge proceeded to instruct in the manner he had described to counsel. Initially, he advised the members that to convict appellant of any offense they must find that Tammy's

> death resulted from the acts and omissions, or failure to act, of the accused on 28 September 1980, at Fort Story, Virginia, by tying Meza-Luna's hands behind her with a belt, placing a noose around Meza-Luna's neck, and leaving her in an isolated area in a position from which the

---

[3] Defense counsel also unsuccessfully requested an instruction that "if you find as a fact that the deceased committed suicide, you must find the accused not guilty."

deceased could not rescue herself, and without notifying anyone.

He also explained:

> The question of whether the accused was assisting Tammy Meza-Luna to commit suicide is not directly involved in this case. The government's theory is the direct effect of the accused's acts in tying Tammy Meza-Luna's hands, placing a noose around her neck, and leaving her in an isolated area from which she could not rescue herself, was to directly cause the victim to hang. Even in jurisdictions where aiding, abetting, or counseling suicide is not a crime, a person is not justified in taking the life of one who desires to die. Consequently, unless you find beyond a reasonable doubt, Nancy Varraso set into motion a chain of events, which alone or together with other factors, played a material or substantial role in Tammy Meza-Luna's death you cannot convict her.
>
> The inclination, if any, of Tammy Meza-Luna to commit suicide should be considered by you along with all other evidence in determining if the chain of events leading to her death could have been stopped or not. It is for you to make this decision, bearing in mind the government's burden to show the fact that she did not suicide, [sic] but was inextricably caught in the chain mentioned before. The accused is responsible if her acts caused the victim to kill herself intentionally or by her negligence.

The military judge then instructed that conviction of premeditated murder required proof that appellant had formed "a specific intent to kill accompanied by consideration of the act or omission intended to bring about the death" and that "she had this premeditated design to kill for a period of time, however brief, and then either did the alleged acts or omitted to act which resulted ultimately in Meza-Luna's death." For unpremeditated murder, it was necessary for the Government to establish "that at the time of the killing the accused had the intent to kill or inflict great bodily harm upon" the

deceased. For involuntary manslaughter the unique element was that "the act or failure to act" which caused the victim's death "amounted to culpable negligence." For negligent homicide the distinctive elements were "that the act or omission of the accused which caused the death of Tammy Meza-Luna, constituted simple negligence" and that "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."

To further clarify the concept of causation the judge advised:

> Now I have told you that the accused's acts or omissions need not be the sole cause of death nor the latest or most immediate cause of death. I also said that they must be such as to play a substantial or material role in the victim's death. But what role should the victim's acts play? You should and must consider the victim's acts in determining if there is proximate cause between the accused's acts and the results; death of the deceased, Tammy Meza-Luna. You must find that an act or omission of the accused beyond a reasonable doubt, played a material role in Tammy Meza-Luna's decease. So obviously Tammy Meza-Luna's actions must be considered by you in determining that fact. Again, I note the accused is responsible if her acts were a contributing proximate cause.

II

[1] Article 118 of the Uniform Code declares that anyone is guilty of murder,

> who, without justification or excuse, *unlawfully kills* a human being, when he–
>
> (1) has a premeditated design to kill;
>
> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

(Emphasis added.)

According to Article 119, "[a]ny person . . . who, with an intent to kill or inflict great bodily harm, *unlawfully kills* a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter"; and

> [a]ny person . . . who, without an intent to kill or inflict great bodily harm, *unlawfully kills* a human being–
>
> (1) by culpable negligence; or
>
> (2) while perpetrating or attempting to perpetrate

certain "offense[s] directly affecting the person; is guilty of involuntary manslaughter." (Emphasis added.)

Because all these offenses require an unlawful killing of a victim, there is no basis for concluding that the causation requirement for premeditated murder differs from that applicable to involuntary manslaughter. Although negligent homicide is not defined by the Uniform Code, the same concept of causation would also apply to it. Accordingly, if the instruction on intervening cause requested by defense counsel requires appellant's exoneration with respect to murder, it would equally require her acquittal with respect to involuntary manslaughter or negligent homicide.

Under the circumstances of this case, such a result would be rather extraordinary. Moreover, it would be contrary to the rationale of our decisions upholding convictions for involuntary manslaughter or negligent homicide where the accused had provided drugs to the deceased.[4] For here the foreseeability of death seems even greater than in those cases.

In all of those cases we relied on this definition of "proximate cause":

> To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause–the latest in

---

[4] *United States* v. *Mazur*, 13 M.J. 143 (C.M.A. 1982); *United States* v. *Moglia*, 3 M.J. 216 (C.M.A.1977); *United States* v. *Romero*, 1 M.J. 227 (C.M.A.1975).

> time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's decease. *See United States* v. *Houghton*, 13 U.S.C.M.A. 3, 32 C.M.R. 3 (1962); 1 Warren, *Homicide* § 59 (perm. ed. 1938); 1 Wharton, *Criminal Law and Procedure* § 290 (1957).

United States v. *Mazur*, 13 M.J. 143, 145 (C.M.A.1982), quoting from *United States* v. *Romero*, 1 M.J. 227, 230 (C.M.A.1975). Under that definition, appellant's conduct fully qualified as a proximate cause of the death of Tammy Meza-Luna. Alone, Tammy could not have positioned the rope and noose so that they would strangle her; and she could not have securely tied her hands behind her with the belt. Thus, Varraso's participation was indispensable in causing her death.

Moreover, the judge's instructions imposed on the Government a burden greater than that of providing the means whereby subsequently the deceased could – by her own choice – cause her death. He explained that the Government's theory was that appellant had left Tammy "in an isolated area in a position from which [she] the deceased could not rescue herself, and without notifying anyone." He referred to "the Government's burden to show . . . that she did not suicide, [sic] but was inextricably caught in the chain mentioned before."

"At common law suicide was a felony"; and "[f]elonious homicide" was "the killing . . . without justification or excuse . . . [of] one's self, or another." *State* v. *Willis*, 255 N.C. 473, 121 S.E.2d 854, 855 (1961). Accordingly, "one who aids and abets another in, or is an accessory before the fact to," suicide had committed a crime. *Id.* at 856. However, in some jurisdictions – because of the abrogation of the common law or for other reasons – suicide is no longer an offense[5]; and so criminal liability cannot be predicated on aiding and abetting accomplishment of a suicide.

---

[5] Nonetheless, in *Willis* the Supreme Court of North Carolina held that attempted suicide is a crime; however, the Air Force Board of Review reached the opposite conclusion under the Uniform Code. *United States* v. *Walker*, 20 C.M.R. 931 (1955).

A few jurisdictions, though, retain the common-law view that one who aids and abets a suicide is a principal in the second degree to the self-murder of another. *See In re Joseph G.*, 34 Cal.3d 429, 194 (Cal. Rptr. 163, 166, 667 P.2d 1176, 1179 (1983). "Some jurisdictions instead classify aiding suicide as a unique type of manslaughter. But the predominant statutory scheme, and the one adopted in California, is to create a sui generis crime of aiding and abetting suicide." (Footnotes omitted.) In these jurisdictions, "the key to distinguishing between the crimes of murder and of assisting suicide is the active or passive role of the defendant in the suicide. If the defendant merely furnishes the means, he is guilty of aiding a suicide; if he actively participates in the death of the suicide victim, he is guilty of murder." *See id.* 194 Cal.Rptr. at 167, 667 P.2d at 1180; *cf. State* v. *Cobb*, 229 Kan. 522, 625 P.2d 1133 (1981).

If the Uniform Code separately prohibited aiding a suicide, it might be arguable that conduct like appellant's – if intended to assist a suicide – would not be murder and that an instruction to this effect would be necessary. However, because the Code makes no provision for such an offense, we believe the legislative intent was to subsume such conduct under murder.

In dealing with a defendant who had caused death in the attempted execution of a suicide pact, the California Supreme Court concluded in a unanimous opinion that, although its murder statute applied to the case, only a conviction for assisting a suicide should be allowed. We acknowledge a similar temptation in the present case to decide that appellant could only be convicted of a lesser-included offense – namely, involuntary manslaughter. However, rather than judicially rewrite the Code, we prefer to rely on reviewing authorities to reduce the sentence in cases where convictions of murder pursuant to a literal application of Article 118 might produce an unduly harsh result.[6]

---

[6] Under the language of Article 118 an accused who has killed another pursuant to a suicide pact might be subject to conviction for premeditated murder with a minimum sentence of life imprisonment.

The instructions given by the military judge properly differentiated the homicide offenses applicable to the evidence before them. The element of causation common to all of these offenses was properly explained. Therefore, we must reject appellant's claim of instructional error.[7]

III

[2] Even though this Court granted review only on an issue concerning the instruction, we also have carefully considered the legal sufficiency of the evidence to establish appellant's intent that Tammy Meza-Luna be killed or seriously injured. The record leaves unclear why appellant might have wanted such unfortunate results. Was she seeking to eliminate or punish a rival for the affections of a lesbian lover? Was she merely sympathetic with Tammy's desire to end what had apparently become a troubled and unhappy life? Was there some other motive?

The Government, however, was required only to prove appellant's intent–and not her motive. *Cf. United States* v. *Kastner,* 17 M.J. 11 (C.M.A.1983).[8] For this, the evidence sufficed. The court members could reasonably have inferred from the manner in which Tammy's hands had been tied and the noose placed around her neck that she had been rendered completely helpless by appellant. Moreover, because under the circumstances Tammy's death was so natural and probable a consequence of appellant's conduct, the members also could have inferred that appellant wished to achieve this result. Appellant's subsequent statement to the investigator disclaims any intent to cause Tammy's death; but, in the face of the other evidence, the factfinders were not bound to believe appellant's self-serving assertion.

---

[7] At one point the judge advised the members that "[t]he accused is responsible if her acts caused the victim to kill herself *intentionally or by her negligence.*" (Emphasis added.) It is unclear whether the last five words of this sentence refer to appellant's intent or negligence or instead to the deceased's. No clarification was requested; and any ambiguity was remedied by other instructions.

[8] Of course, proof of motive often is valuable in showing intent.

IV

The decision of the United States Army Court of Military Review is affirmed. The petition for new trial is denied.[9]

Judge COX concurs.

---

[9] Apart from any question of diligence, none of the evidence in the petition would be likely to change the result if there were a new trial.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 441203

UNITED STATES, APPELLEE,

v.

SPECIALIST FIVE NANCY J. VARRASO, SSN 029-50-3873, UNITED STATES ARMY, APPELLANT.

8 MARCH 1983.

Captain John D. Martin, JAGC, argued the cause for the appellant. With him on the brief were Colonel Edward S. Adamkewicz, Jr., JAGC, Major Raymond C. Ruppert, JAGC, Major James F. Nagle, JAGC, and Martin S. Cosgrove, Esquire.

Captain Gary L. Hoffman, JAGC, argued the cause for appellee. With him on the brief were Colonel R.R. Boller, JAGC, Lieutenant Colonel John T. Edwards, JAGC, and Captain Thomas E. Booth, JAGC.

Before MELNICK, McKAY AND LEWIS, Appellate Military Judges.

OPINION OF THE COURT

McKAY, Judge:

This case is before the Court for mandatory review pursuant to Article 66, Uniform Code of Military Justice, Section 866, Title 10, United States Code (1976) (hereinafter UCMJ). The appellant, Specialist Five Varraso, was tried for premeditated murder. Convicted of unpremeditated murder, she was sentenced to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for eight years and a dishonorable discharge. The convening authority approved

the sentence. While the appellant asserts that numerous errors occurred at her trial, only the following contentions merit discussion. The first is the sufficiency of the evidence. The appellant also contends that the military judge erred by admitting her pretrial statement because it resulted from an illegal arrest, and also because agents of the Criminal Investigation Command (CID) failed to notify a defense counsel appointed to represent her in a prior CID investigation before her interrogation. The final significant issue is whether the military judge erred by refusing to give a defense requested instruction on intervening cause in the death of the victim by hanging. We disagree with the appellant's contentions and affirm the findings and sentence.

The evidence of record establishes that when Private First Class Tammy Meza-Luna failed to report at morning formation on 29 September 1980, her husband, a Specialist Five, began to search for her. He found her hanging by her neck from a rope around a tree limb in a secluded wooded area behind her unit's female barracks at Fort Story, Virginia. Tammy's body was leaning at an angle with her knees bent and her feet touching the ground. Tammy Meza-Luna was dead from strangulation.

Captain Wicinski, the company commander of both the decedent and the appellant, knew that the appellant was involved in a homosexual relationship with Becky Smith, another member of his unit;[1] that the appellant and the decedent had a confrontation and scuffle with Smith at an off-post residence a day or so earlier; that over the week-end Smith and the decedent had been found in the barracks naked in bed

---

[1] Some two months before Meza-Luna's death, the appellant and Smith had advised the Captain of their homosexual relationship and that they wanted to be separated from the Army. He reported the matter to the CID, which completed an investigation of the matter prior to Meza-Luna's death. No charges were preferred against either woman, however, an administrative elimination action was initiated. A defense counsel was appointed for the appellant with respect to this action. At least one CID agent involved in this first investigation was aware that the appellant was represented by legal counsel.

together; that the appellant had threatened anyone coming between her and Smith; that on the preceding day the appellant and the decedent were found in the wooded area behind the female baracks with a rope;[2] and that Meza-Luna's hands had been tied with a military type belt. After learning of Meza-Luna's death. Captain Wicinski restricted his unit, and at that time he also wanted to segregate the appellant from the other members. He was advised by the Provost Marshal, a personal friend, to send her to the Military Police (MP) station. Captain Wicinski ordered the appellant to be taken to the MP station by a warrant officer who was a member of the unit. The appellant waited at the MP station some five hours, but at no time was she told that she was under apprehension or arrest, nor was she placed in physical restraint. While not free to leave the station, she was allowed to move about it, use its facilities, and sleep on a bench in front of the desk sergeant. At about 2330 hours, 29 September, the appellant was taken from the MP station by CID agents to the Military Police Investigations office, the CID's base of operations for their investigation of Meza-Luna's death.[3]

After receiving advice with respect to her rights to counsel and under Article 31, UCMJ, 10 U.S.C. § 831 the appellant waived her right to counsel and after several hours of interrogation by the CID gave an oral statement that was subsequently reduced to writing and signed. In the statement the

---

[2] From the record of trial it appears they contemplated a joint suicide but were prevented from doing so when they were discovered and ordered back to their barracks.

[3] By 2330 hours, the CID case agent for the Meza-Luna investigation had evidence clearly indicating that someone besides the victim was involved in Meza-Luna's death because her hands were securely tied behind her back. He was also aware of the homosexual incident in the barracks involving Meza-Luna and Smith, the homosexual activities of Smith, Meza-Luna and the appellant, that the appellant had threatened anyone who came between Smith and herself and of the thwarted joint suicide attempt by the appellant and Meza-Luna. The CID also knew that when the appellant returned to Fort Story, after having spent the day of 29 September away, she told other members of her detail the deceased's identity after they learned a female in their unit had apparently committed suicide and before Meza-Luna's identity could have been made known to them.

appellant said that at sometime during the evening of 28 September, Meza-Luna woke her up and pleaded for help to hang herself. The two of them then went to the same desolate wooded area where they had been seen in the afternoon with a rope. Once there, the appellant saw a rope with a noose hanging from a tree. At Meza-Luna's urging, the appellant tied Meza-Luna's hands behind her back with a military type belt and and put her head into the noose. According to the appellant's statement, she left the noose open enough for Meza-Luna to get her head out if she chose. The appellant then kissed Meza-Luna on the forehead and left her standing under the tree; she went back to her barracks and went to sleep.

[1] Initially, we disagree with the contention of the appellant that the "evidence introduced at trial was insufficient to sustain a conviction for murder because it indicates that the decedent committed suicide." We find as a matter of fact that when the appellant securely tied Meza-Luna's hands behind her back, placed the noose over her head and left her alone in a secluded wooded area at night, she set into motion a chain of events that directly, or at least materially and substantially, caused Meza-Luna's death. We are convinced beyond a reasonable doubt that, contrary to the statement of the appellant, the evidence establishes that the noose was placed over Meza-Luna's head in a manner that precluded her from removing her head without assistance. Accordingly, Meza-Luna's fate was sealed when the appellant departed the scene leaving her helpless. It is immaterial whether Meza-Luna intentionally or accidentally slumped in the noose, or collapsed from weariness and fatigue, as either way the actions of the appellant caused her death. The evidence therefore is sufficient to establish unpremeditated murder.

[2] The appellant contends that her pretrial statement was erroneously admitted because it was the product of an illegal arrest that resulted when she was taken to the MP station. We disagree as we believe that any apprehension occurring at the time would have been made as a result of Captain Wicinski's order and that based upon the information he had there was probable cause for him to apprehend the appellant.

We find, however, as did the military judge at the trial, that she was not apprehended until the CID picked her up at about 2330 hours at the station. After the discovery of Meza-Luna's body, Captain Wicinski had again placed his unit on restriction after having just removed it from that status because of another incident. There was some anger in the unit towards the appellant because of her presumed involvement in the death. Captain Wicinski was justifiably concerned not only for the safety of the appellant, but also for having her and other members of the unit available for the CID investigation. He was motivated to send her to the MP station, at the suggestion of his friend, the Fort Story Provost Marshal, in order to segregate her and allow for her to be watched. This was wise, appropriate and fully justified at the time. The MP station was merely a place of convenience to accomplish this legislative obligation of a company commander. We find nothing unusual in this use of a police facility by a company commander on a small installation after normal duty hours. Military personnel have different obligations because of their military status and "the relationships inherent in a military organization are different from those of the [ordinary] citizen and the police". *United States* v. *Schneider*, 14 M.J. 189 (C.M.A. 1982). Therefore, sending the appellant to the MP station has no more legal significance in this case, than had the commander sent her to a room in the barracks, the post library or any other convenient place to await developments in the on-going CID investigation.

[3, 4] The appellant also asserts, that because an attorney represented her in the CID investigation into her self-confessed homosexual activities and in the resulting on-going administrative elimination action, the failure to notify him prior to her interrogation in this case makes her statement inadmissible. She cites Military Rule of Evidence (MRE) 305(e) and *United States* v. *McOmber*, 1 M.J. 380 (C.M.A. 1976).

The pertinent provisions of MRE 305(e) require that a person subject to the UCMJ, who intends to question another member suspected of an offense, and "knows or reasonably should know that counsel . . . has been appointed for . . . the

. . . suspect with respect to that offense, [must notify] the counsel . . . of the intended interrogation", and counsel must be afforded an opportunity to be present before the interrogation may proceed. In our view, the plain wording of MRE 305(e) exempted any requirement for notice to the appellant's appointed counsel as the offense for which she was interrogated was different and unrelated to any for which the counsel had been appointed. That was the status of military law before MRE 305(e) became effective, *United States* v. *McDonald*, 9 M.J. 81 (C.M.A.1980), and is the law applied by the new rules. S. Saltburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual*, p. 95 (1981).

In determining whether offenses are different the Court of Military Appeals has been unwilling to require separation or to make subtle distinctions between offenses occurring in the same general area within a short period of time. *United States v. Lowry*, 2 M.J. 55 (C.M.A.1976). We do not appear to be faced with that type of a situation in this case. Here the first CID investigation had been completed, and although the record of trial does not indicate the report had been finalized, no charges were pending, and only an administrative separation of the appellant was in preparation. The second investigation related only to the death of Meza-Luna who apparently was uninvolved in the activities covered in the first investigation.[4] The homosexual activities between the appellant and Smith investigated in the first investigation and the investigation of Meza-Luna's death were separated in time by two or more months, the decedent was not a subject in the first investigation, and Smith was not a subject in the second investigation. Considering these facts, we find that the time of occurrence, and the nature and gravaman of the offenses are separate, different, and therefore are unrelated except as to the existence of motive or the possibility

---

[4] During her interrogation the appellant was asked whether there were homosexual activities between herself and the victim and if she knew of the barracks incident in which the decedent had been seen naked in bed with Smith. We believe these questions were intended to ascertain only whether there was motive for the appellant to have killed Meza-Luna.

thereof.[5] Accordingly, there was no requirement for the CID to have notified the appellant's appointed counsel before interrogating the appellant about Meza-Luna's death. We hold that the resulting statement was properly admitted at the trial of this case.

[5-7] The appellant also assigns as error the failure of the military judge to instruct the court on intervening cause even though, she asserts, that defense was raised and the instruction was requested. The substance of the requested instruction was that should the court members find that the deceased was in a secluded area in a position from which she could extricate or rescue herself, but intentionally slumped forward and killed herself, then that would be an intervening cause. At the time the instruction was requested, the military judge refused to give it pointing out that, for there to be an intervening cause, such cause must not be foreseeable. In other words, the military judge did not believe the defense of intervening cause had been raised by the evidence. We agree.

The intervening cause test requires that:

> 1. The injury or death resulted from an independent, intervening cause, and
>
> 2. The accused did not participate in the intervening cause, and
>
> 3. The intervening cause was not foreseeable.

40 Am.Jur.2d, Homicide § 17; *United States* v. *King*, 4 M.J. 785 (N.C.M.R.1977); *United States* v. *Eddy*, 26 C.M.R. 718 (A.B.R.1958); *see United States v. Houghten*, 13 U.S.C.M.A. 3, 32 C.M.R. 3 (1962) (Ferguson, J., dissenting). Assuming that the decedent did intentionally slump forward, thus tightening the noose around her neck and thereby strangle, we find that to have been foreseeable by the appellant. The appellant knew that Meza-Luna had a recent marital dispute, had left her husband and moved into the barracks, was upset with respect to her homosexual involvement with Smith, had

---

[5] Knowledge of the Varasso-Smith homosexual relationship and the appellant's statement threatening anyone coming between them was one fact that determined probable cause to arrest the appellant by the CID. This involved possible motive also.

indicated an intention to commit suicide on more than one recent occasion, and in fact, with the appellant herself, had engaged in two abortive attempts to commit suicide that afternoon. Finally, Meza-Luna had awakened the appellant and enticed her to the desolate wooded area for the stated purpose of assisting her to commit suicide. Even the appellant's statement upon which she relies as establishing the defense of intervening cause when considered in its entirety, belies her insistence that she did not believe Meza-Luna intended to kill herself. Moreover, if strangulation resulted from an accidental fall or from fatigue, the result is the same as both situations were foreseeable under the circumstances. While an accused is entitled to have instructions relating to any defense theory raised by the evidence, *United States* v. *Bellamy*, 15 U.S.C.M.A. 617, 36 C.M.R. 115 (1966), a requested instruction is properly rejected if the evidence does not sustain it. *State* v. *Glover*, 330 Mo. 709, 50 S.W.2d 1049 (1932), Annot., 87 A.L.R. 400. We hold the military judge correctly found the defense of intervening cause not to have been raised by the evidence and therefore properly rejected the requested instruction.

We have considered the other matters raised by the appellant and find them to be without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge MELNICK and Judge LEWIS concur.

U.S. GOVERNMENT PRINTING OFFICE: 1986—152 234/21016